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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER 1956 TERM

No. 376

JOHN P. KINSEY, LAWRENCE G. KUNKEL and THE WATERBURY CORRUGATED CONTAINER COMPANY,

Petitioners,

v.

BURTON S. KNAPP, CHARLES E. RANEY, GEORGE A. BLUM, DON B. LEATHERS and ARTHUR W. SEMPLINER, individually and as Directors and Stockholders of MONROE PAPER PRODUCTS COMPANY, and as Trustees under Voting Trust Agreement dated as of December 31, 1953, pertaining to stock therein; GEORGE J. HUBER, individually and as Chairman of Stockholders' Committee of MONROE PAPER PRODUCTS COMPANY stock,

Respondents.

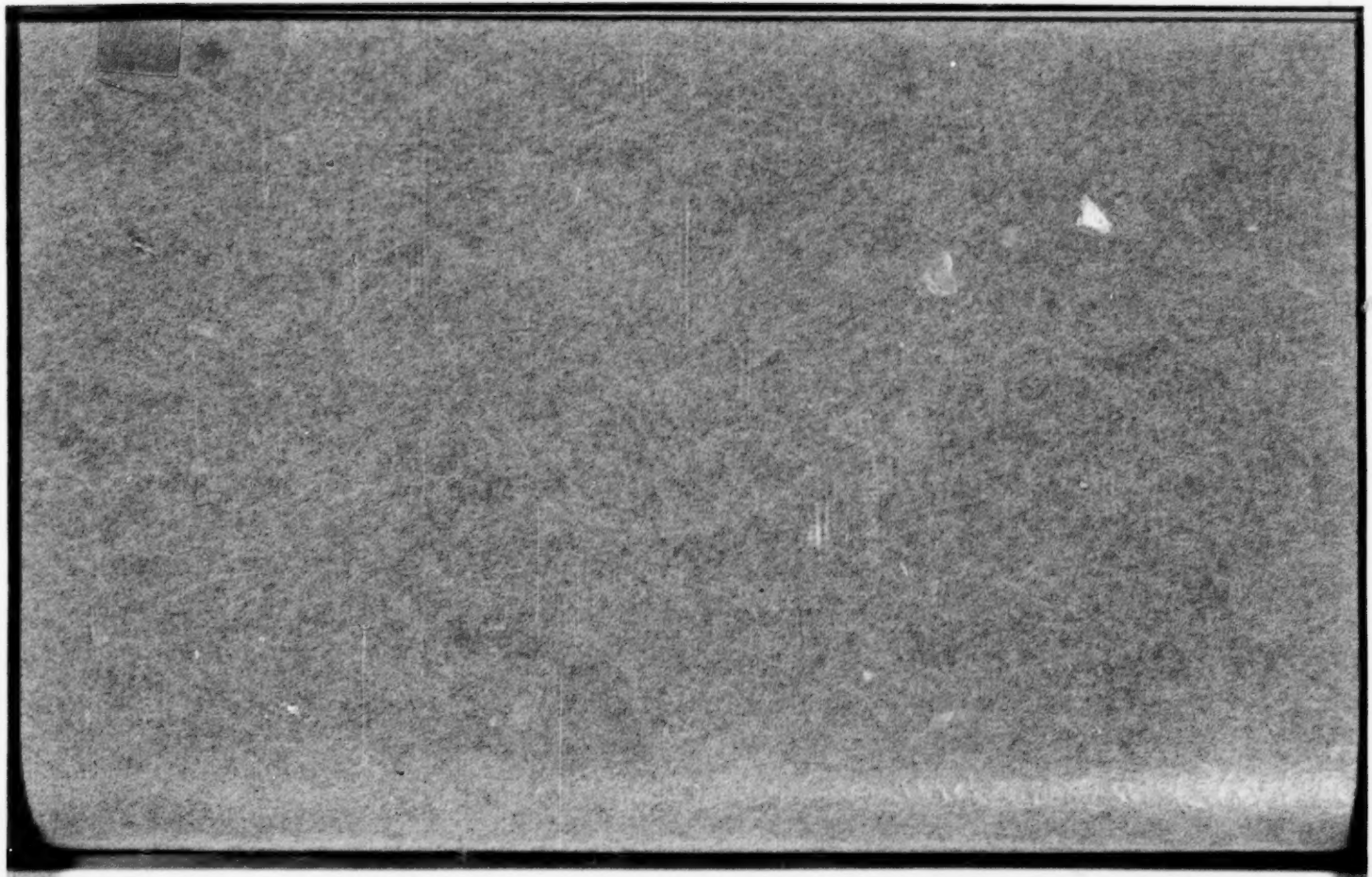
PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Opinions—Below

Knapp et al v. Kinsey et al (CA 6, May 1, 1956), 232 F 2d 458. Nine copies are filed with this petition.

Knapp et al v. Kinsey et al (CA 6, July 19, 1956) as to Rehearing or Supplemental Order as to Costs (Not yet reported; nine copies are filed with this petition).

Kinsey et al v. Knapp et al (D.C.E.D. Mich., August 4, 1955). Not reported. See appeal appendix pages 167a-322a.*

Statement as to Jurisdiction

Date of the judgment sought to be reviewed and date of entry—May 1, 1956 and date of order denying rehearing as to costs and date of entry—July 19, 1956.

Statute believed to confer jurisdiction to review by certiorari—28 USC § 1254(1).

Questions Presented for Review

1. Having ordered a new trial of a derivative action solely on the ground that bias and prejudice on the part of the trial judge rendered the resulting judgment nugatory, did the Court of Appeals have the power or discretion to require petitioners (the appellees) to repay respondents' (appellants') costs on the appeal?

2. In any event was not the allowance to respondents of $9,356.76 cost of printing their appendix and $1,875 premium on supersedeas bond, inequitable and improper,

*Page references, in this petition, followed by "a" are to respondents' (appellants') printed appendix in the Court of Appeals, and those followed by "b" are to petitioners' (appellees') printed appendix in that court. Nine copies of both appendices and of the proceedings in the two Court of Appeals opinions referred to, supra, are filed pursuant to Rule 23 of this Court.

especially in view of the facts that (a) respondents failed during the trial to seek to disqualify the trial judge or to move for mistrial because of claimed bias or prejudice, (b) the judgment against respondents was for breach of their fiduciary duty to the defendant Company and was not subject to waiver or abandonment by the plaintiff stockholders without the approval of the Court, and (c) the bond and at least 4108 out of 4458 pages of the respondents' appendix (see Petition for Rehearing, page 3) pertained to the merits of the action and as to which neither party prevailed in the Court of Appeals?

Statement of the Case

On February 2, 1954 petitioners, seeking derivative relief as stockholders of Monroe Paper Products Company and also individual relief, instituted an action in the District Court against five of the respondents as a majority of the directors of the Company and as trustees under a five year voting trust agreement dated December 31, 1953 pertaining to stock in the Company. Respondent Huber and the Company were joined as defendants. The complaint, as amended and supplemented after discovery examinations (16a-51a, 111a-116a), charged, *inter alia*, misuse of company funds and facilities, wrongful diversion of corporate opportunties and that the voting trust agreement was in violation of the defendant directors' fiduciary duties and state and federal laws, including those pertaining to restraint of trade and to the issuance and sale of securities. Accounting, declaratory, injunctive, and other, relief was sought. Jurisdiction of the District Court was based upon diversity of citizenship and jurisdictional amount and federal questions. Trial commenced on October 12, 1954 and was completed on June 2, 1955 (8a-

14a). On August 4, 1955 the trial judge filed detailed findings of fact and conclusions of law, consisting of 170 typewritten pages[1] expressly finding that the voting trust was violative of the fiduciary duties owing to the Company and its stockholders by the respondents (310a-312a, also 249a). Partial final judgment was thereupon entered holding the individual defendants accountable *to the Company* for upwards of $300,000 and dissolving the voting trust agreement (318a-322a). Trial of the claims of the plaintiffs for individual relief was deferred (432b-435b). On August 5, 1955 the respondents appealed, giving bond to stay execution (14a-15a).

Respondents took no steps to disqualify the trial judge either at the start of or at any time during the trial or to claim a mistrial. Instead, at the conclusion of the plaintiffs' case they sought dismissal of the plaintiffs' claims on the merits and throughout affirmatively requested that the trial judge make findings in their favor on the merits (1203a-1205a; 118a-166a). They did not seek a rehearing on any ground. On the appeal they did not seek reversal or new trial on the grounds of disqualification of the trial judge or of mistrial, but affirmatively sought judgment in their favor on the merits. In their brief they stated and raised only the following questions:

> Are the findings of the trial judge entitled to any weight?
>
> Is there any evidence of corporate mismanagement or misappropriation of funds?
>
> Is there any evidence of a conspiracy?
>
> Is the voting trust valid?

[1]Included in appeal appendix pages 167a-324a.

and prayed only—

> "that the findings be vacated * * * and that the judgment be reversed with costs *and the case dismissed.*"

The first assertion of any claim of bias and prejudice was made in respondents' brief on appeal served in October 1955, after their appendix had largely been printed and the printing of appellees' appendix was well under way.

The appeal was argued on December 12, 1955 and was decided May 1, 1956 (232 F 2d 458; nine copies filed herewith). Copy of the judgment of the Court of Appeals, entered May 1, 1956 is attached (page 11, post). The Court did not pass upon any of the questions pertaining to the merits but remanded the case for new trial before another judge because the trial judge "failed from the start of the trial to view this case with the impartiality between litigants that the defendants were entitled to receive," expressly stating that petitioners' counsel "did not ask or need such assistance." The decision was silent as to allowance of costs, but Rule 23(3) of the Court of Appeals provides that in case of reversal of any judgment, costs shall be allowed to the appellant, unless otherwise ordered by the Court.

On May 11, 1956 petitioners filed their petition for rehearing or supplemental order as to costs, seeking disallowance of costs or reapportionment. This petition is part of the record below and nine copies are filed herewith. On July 19, 1956 the Court of Appeals, by written decision, ante, denied the petition for rehearing. Copy of the denial order entered July 19, 1956, is attached (page 12, post). Mandate for retrial and allowing respondents their costs on appeal was issued on August 23, 1956, supplemented

by order filed August 22, 1956, staying execution for said costs pending this application for certiorari. Copies of the mandate and stay order are attached (pages 14-17, post).

Petitioners seek certiorari to review the action of the Court of Appeals in allowing such costs and, in any event, in refusing to apportion them.

Argument

The question presented is basic and fundamental in the administration of justice—not an ordinary or mere matter of the award, apportionment or withholding of costs as between litigants, but an overlying and vital element of the government's responsibility for the judicial process.

Decisions, *on appeal*, denying relief from discretional allowances of costs by a district judge are not applicable. However, where the power to award costs is in question review even on an appeal has been granted. *Newton v. Consolidated Gas Company of New York*, 265 U S 78, 68 L ed 909, approving *In re Michigan Central R. Co.* (CCA 6), 124 Fed 727.

Whether tested from the point of lack of power or discretion or improper exercise thereof, the question merits review under the supervisory powers of this Court. As the end-result of months and months of taking of testimony in the trial on the merits, joint approval of extensive findings of fact, extended arguments and a judgment in the Company's favor for derivative relief, a mistrial was declared solely because of bias and prejudice of the trial judge, whereupon one group of the unfortunately affected litigants which has already paid its appeal expense of $7,700, is ordered also to pay the $11,000 of costs of the

other group despite the fact that it was without fault of either group that no judicial determination has been obtained upon the claims sought to be adjudicated. Petitioners contend that the imposition of costs upon them is, under the circumstances, unjust and a denial of due process of law.

The responsibility for the selection and conduct of a trial judge is that of government. The right of every litigant to a trial presided over by a qualified judge is a *sine qua non* of due process of law. A mistrial is equivalent to no trial.

Petitioners contend that the Court of Appeals had no right or power to impose upon petitioners responsibility for respondents' costs. Fault was not that of petitioners.

Talbert v. Muskegon Construction Co., 305 Mich. 345:

> "One of the fundamental rights of a litigant under our judicial system is that he shall be entitled to a hearing before a court to which no taint of prejudice is attached. This is so firmly established as to regularly constituted courts as to need no comment. * * *
>
> "We are constrained to hold that the hearing and award must be vacated and the case remanded for a full rehearing either before the department or before a qualified deputy commissioner. *Since we do not find that either party was solely responsible for the irregular proceedings taken, no costs are awarded.*" (Italics added)

Petitioners contend that the decision of the Court of Appeals so far departs from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory function, and that the decision also conflicts with that of other courts including the United States Court of Appeals for the First Circuit.

Crowe v. DiManno (CA 1), 225 F 2d 652, 659. Appellants sought and obtained a new trial before another judge because of misconduct of the trial judge. Notwithstanding, the court held:

> "* * * But we are not vacating the judgment below for any misconduct of counsel for the plaintiff. We are vacating it for repeated acts of misconduct by the trial judge and in this situation we do not *think the plaintiff-appellee should be charged with costs in this court.*" (Italics added)

Even where reversal is compelled because of lack of jurisdiction, costs are not imposed against the appellee if appellant did not raise the question in the District Court. *Matthew v. Coppin* (CCA 9), 32 F 2d 100, 102; *Hunt v. Howes* (CCA 5), 74 Fed 657, 659; *Newcomb v. Burbank* (CCA 2), 181 Fed 334; *Cornelius v. C.C. Pictures, Inc.* (CCA 2), 7 F 2d 308.

Tug River Coal & Salt Co. v. Brigel (CCA 6), 67 Fed 625. Where the question of jurisdiction was not raised in the lower court, equal division of costs on appeal was ordered, undoubtedly on the theory that both parties were at fault. See *Peper v. Fordyce*, 119 U S 469, 30 L ed 435.

Petitioners also contend that the Court of Appeals herein erred in holding that 28 USC § 144 requiring that affidavits of prejudice be filed not less than 10 days before the beginning of the term "or good cause be shown for failure" is not applicable when the claimed bias or prejudice was first disclosed during the trial. The contrary has been ruled in other Circuits, consistently with the Code.

In *Morris v. U.S.* (CCA 8), 26 F 2d 444, the affidavit of prejudice was filed on the day of trial. In *Hurd v. Letts* (CA D. C.), 152 F 2d 121, the affidavit was filed 5 days

after trial commenced and the filing was held proper to preserve the question for review on appeal and prohibtion was denied.

Petitioners contend that the code expressly contemplates belated filing under the instant circumstances. The opinion of the Court of Appeals herein discloses that the bias and prejudice which destroyed the effectiveness of the trial was manifested from the outset and many months before the judgment and that the conduct resulted in the reversal of the contempt order against Mr. Timbers[2] was long before the trial of the derivative action was completed. In fact the trial was delayed to permit the hearing of the contempt appeal. The record herein is clear that respondents, even in the Court of Appeals, unsuccessfully sought only to obtain a decision in their favor on the merits without urging that a mistrial had occurred. Under such circumstances the imposition upon petitioners of the printing costs incurred by respondents in presenting their contentions that the complaint should be dismissed on the merits is unjust.

It is patent that the imposition of costs was due to the Court's misinterpretation of 28 USC § 144, for the Court (Opinion page 2) unequivocally held that:

> "In our opinion, Section 144, Title 28, U.S. Code was not applicable to this case in which the claimed bias or prejudice was first disclosed during the trial."

No other appellate court has so restricted the operation of the code provision. Petitioners contend that by such basic misconstruction the Court reached the erroneous

[2]Appeal of the United States Securities and Exchange Commission and William H. Timbers (CA 6), 226 F 2d 501.

conclusion that right and equity as to costs was with respondents under the circumstances.

The partial relief granted by the trial judge was solely for wrongs perpetrated *upon the Company* by the respondent directors. In respect thereto the petitioners, as plaintiffs, were trustees for the Company's benefit. *Denicke v. Anglo California Nat. Bank of San Francisco* (DC N. D. Cal.), 45 F Supp 524; *Goodwin v. Castleton*, 19 Wash. (2d) 748, 144 P. (2d) 725; 150 ALR 859. Rule 23(c), Rules of Civil Procedure, recognizes this by its provision that:

> "(c). A class action shall not be dismissed or compromised without the approval of the court."

Petitioners had no right to waive the judgment or its enforcement. The Company was the real litigant as to the matters determined in the District Court and petitioners contend that the imposition on them of the appeal costs was unwarranted.

Wherefore, petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the United States Court of Appeals for the Sixth Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Court of Appeals had in the case numbered and entitled on its docket, No. 12,676, *Knapp et al, Appellants v. Kinsey et al, Appellee*, to the end that said cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Court of Appeals be reversed

by this Court, and for such further relief as to this Court may seem proper.

Dated August 29, 1956.

John P. Kinsey,
Lawrence G. Kunkel,
The Waterbury Corrugated
Container Co.,
Petitioners,

By George E. Brand,
Their Attorney.

GEORGE E. BRAND,
Attorney for Petitioners,

GEORGE E. BRAND, Jr.,
Of Counsel,

3709-23 Cadillac Tower,
Detroit 26, Michigan.

APPENDIX

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

No. 12,676

BURTON S. KNAPP, ET AL.,
Appellants,

vs.

JOHN P. KINSEY, ET AL.,
Appellees.

JUDGMENT

Before SIMONS, Chief Judge; ALLEN and MILLER, Circuit Judges.

APPEAL from the District Court of the United States for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Michigan, and was argued by counsel.

ON CONSIDERTION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the case remanded to the District Court for a retrial before another judge.

Approved for entry:

/s/ Shackelford Miller, Jr.
United States Circuit Judge

FILED
May 1, 1956
Carl W. Reuss, Clerk

No. 12,676

ORDER DENYING REHEARING

(Filed July 19, 1956)

Before SIMONS, Chief Judge; ALLEN and MILLER, Circuit Judges.

Appellees' Petition for Rehearing or Supplemental Order as to Costs is denied.

Approved for entry:

/s/ Shackelford Miller, Jr.
U. S. Circuit Judge

MANDATE

(Issued August 23, 1956)

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable, the Judges of the United States District Court for the Eastern District of Michigan—GREETING:

WHEREAS, lately in the United States District Court for the Eastern District of Michigan, before you or some of you, in a cause between *John P. Kinsey, Ind., et al., Plaintiffs, and Burton S. Knapp, et al Defendants,* (D. C. No. 13,179 Civil), a judgment was entered on the 4th day of August, 1955; and on August 9, 1955, an order was entered correcting errors in judgment under Rule 60(a);

AND WHEREAS, the said Defendants appealed to this court as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Court of Appeals for the Sixth Circuit by virtue of an appeal agreeably to the Act of Congress, in such cases made and provided, fully and at large appears.

AND WHEREAS, in the present term of October, in the year of our Lord, one thousand nine hundred and fifty-five, the said cause came on to be heard before the said United States Court of Appeals for the Sixth Circuit, on the said transcript of record, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is

hereby reversed and the case remanded to the District Court for a retrial before another judge.

A further order was entered on the 22nd day of August, 1956, a copy of which is attached:

YOU, THEREFORE, ARE HEREBY COMMANDED that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

WITNESS the Honorable EARL WARREN, Chief Justice of the United States, the twenty-third day of August in the year of our Lord one thousand nine hundred and fifty-six.

Carl W. Reuss,
Clerk, United States Court of
Appeals for the Sixth Circuit.

By. Noyce S. Robertson,
Chief Deputy.

COSTS—(To be recovered by appellants)	
Clerk	$ 25.00
Printing record as appendix to brief and premium bond	$11,231.70
Total	$11,256.70

(Seal)

No. 12,676

ORDER STAYING EXECUTION AS TO COSTS

(Filed August 22, 1956)

Before SIMONS, Chief Judge; ALLEN and MILLER,, Circuit Judges.

Appellees' motion for a stay of execution having been considered by the Court;

IT IS ORDERED as follows:

1. That the mandate of this Court go down to the District Court forthwith, and that a copy of this order be attached to the mandate.

2. Execution for the collection of the costs taxed in this court in favor of appellants is hereby stayed pending the outcome of an application intended by appellees to be made to the Supreme Court for a writ of certiorari upon condition (a) that within five days after this date appellees file with the Clerk of this Court a stay bond in the penal sum of $12,000.00, conditioned as provided in paragraph 3 of this order, *and* (b) that on or before September 12, 1956 appellees file their petition for certiorari with the Clerk of the Supreme Court; and in default of such filing of said bond or petition the stay of execution shall terminate.

3. Said bond shall be approved by counsel as to form and security or shall be settled by the Clerk on notice and shall be conditioned that appellees shall answer for all damages and costs which appellants may sustain by reason of this stay, and that appellees shall pay appellants the

full sum of $11,256.70 with interest thereon from this date if said application for certiorari shall be denied by the Supreme Court, or if such application be granted appellees will abide and perform the final determination of the Supreme Court thereon.

Approved for entry:

/s/ Shackelford Miller, Jr.,
U. S. Circuit Judge.